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No. 86-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
*Petitioner,*

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,
*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION OF DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, TO ESTABLISH A BRANCH OFFICE IN GULFPORT, MISSISSIPPI

## I. BACKGROUND

By application dated September 10, 1984, Deposit Guaranty National Bank ("DGNB") has applied to establish a branch in Gulfport, Mississippi. DGNB's main office is located in Jackson, Mississippi. The proposed branch would be more than 100 miles from that main office.

The National Bank Act provides that:

> [a] national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. § 36(c).

Section 36 further provides that:

> [t]he words "State bank," "State banks," "bank" or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

12 U.S.C. § 36(h).

Mississippi law provides that branch banks may be established by state-chartered commercial banks within a radius of 100 miles of the parent bank. Miss. Code of

1972, Ann., § 81-7-7. On the other hand, Mississippi-chartered savings associations are authorized to branch without a territorial limitation and may, thus, branch statewide. Miss. Code of 1972, Ann., § 81-12-175.

The application states that the requirements of 12 U.S.C. § 36 are met because Mississippi savings associations are carrying on the business of banking under state laws and are, thus, "State banks" for purposes of section 36. Since Mississippi savings associations may branch statewide, the applicant concludes that national banks in Mississippi may do likewise. As to other applicable Mississippi law, the application states it meets the statutory requirements as to name (§ 81-7-3, Miss. Code of 1972, Ann.) and paid-in, unimpaired capital (§ 81-7-9, Miss. Code of 1972, Ann.).

Fourteen comments, most of them protesting the legality of a national bank branch being established outside the 100 mile limit in section 81-7-7, Miss. Code of 1972, Ann., were received and acknowledged. The comment period ended on October 10, 1984.

## II. OCC POLICY ON ESTABLISHMENT OF DOMESTIC BRANCHES

The regulation governing establishment and operation of domestic branches provides that the Office is guided by the following principles:

> The Office is responsible for maintaining a sound banking system; the Office is responsible for encouraging a bank to help meet the credit needs of its entire community; the marketplace is normally the best regulator of economic activity; and competition promotes a sound and more efficient banking system that serves customers well . . . . Accordingly, it is the general policy of the Office to approve applications to establish and operate branches . . . provided

> that the approval would not violate the provisions of applicable federal law or State law that is incorporated into federal law regarding the establishment of such branches . . . .

12 C.F.R. § 5.30(c).

The Office does, however, reserve the right to deny applications, or to grant approval subject to fulfillment of certain conditions, if:

> (i) There are significant supervisory concerns with respect to the applicant or any affiliated organization as defined by 12 U.S.C. 221a; or
>
> (ii) The applicant's record of helping to meet the credit needs of its entire community, including low and moderate income neighborhoods, consistent with the safe and sound operation of the bank, is less than satisfactory; or
>
> (iii) Any financial or other business arrangement, direct or indirect, involving the proposed branch . . . and bank insiders (directors, officers, employees, and shareholders owning or controlling directly or indirectly, 10 percent or more of any class of the subject bank's voting stock) involves terms and conditions more favorable to the insiders than would be available in a comparable transaction with unrelated parties.

12 C.F.R. § 5.30(c)(2).

After reviewing these factors in connection with the subject application, I find no reason to deny or condition approval of this application. Therefore, the establishment and operation of a branch by DGNB in Gulfport, Mississippi, is approved. As discussed below, I have found the approval to be consistent with applicable law.

## III. LEGAL ISSUES

A. The language of secton 36 requires consideration of the branching powers of financial institutions other than state commercial banks.

The establishment and operation of branches by national banks is governed by 12 U.S.C. § 36, which was originally enacted in 1927 as part of the McFadden Act. As set out above, section 36(c) provides, briefly, that national banks may branch to the same extent as state banks in the state in which they are located. "State bank" is defined "to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws." 12 U.S.C. § 36(h).

The definition on its face covers more than commercial banks, which are not specifically mentioned. Indeed, Congress apparently presumed that the mere use of the term "State bank" in the substantitive portions of section 36 was sufficiently clear with regard to commercial banks. The plain meaning of section 36(h) thus evidences its purpose—to ensure that state institutions, not necessarily defined by state law as "banks," but nonetheless carrying on the business of banking under authority of State laws, be included within the term "State bank." In other words, if Congress were only concerned with state commercial bank competition, then section 36(h) would apparently not have been enacted. It was, however, enacted and must, according to principles of statutory construction, be given meaning. *See* C. Sands, *Statutes and Statutory Construction* §§ 46.06, 47.28 and 47.37 (3d ed. 1975 and Supp. 1983).

The precise question is, therefore, whether Mississippi savings associations are "institutions carrying on the banking business under authority of State laws." The answer is a matter of federal, rather than state law.

B. Supreme Court case law supports application of a federal definition of "State bank."

The decisions of the U.S. Supreme Court, while not directly on point, do provide basic principles to be used in the interpretation of section 36 and do support the position that Congress intended that section 36(h), rather than state law definitions, determine which financial institutions are "State banks" for purposes of section 36(c). In *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252 (1966), the Court addressed the issue of whether national banks could establish branches through means other than acquisition in localities where, under Utah law, state-chartered banks could establish branches only through acquisitions of banks which had been in existence over five years. The national banks argued that the state-law restrictions went merely to the "method" of branching, not to "whether" or "where" branches could be established and, thus, were not made applicable to national banks by section 36(c).

In the course of deciding to reject the bank's argument, the Court reviewed the legislative history and purposes of section 36, concluding that the policy of competitive equality is the guiding principle in its interpretation. The Court stated that:

> It appears clear from [the Court's] resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of "competitive equality" insofar as branch banking was concerned. Both sponsors of the apppplicable banking Acts, Representative McFadden and Senator Glass, so characterized the legislation. It is not for us to so construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption . . . .

*First National Bank of Logan, supra*, at 261. *See Independent Bankers Association v. Smith*, 534 F.2d 921

(D.C. Cir. 1976) (policy of competitive equality manifests Congressional concern that neither the state bank system nor the national bank system was to have advantage over the other under section 36).

In light of this overriding legislative concern for competitive equality, the Supreme Court in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), for the first time addressed the interpretation of a definitional provision of section 36. The Court examined the definition of "branch" contained in 12 U.S.C. § 36(f) and found it to include two off-premises bank services (armored car service and secured receptacle for receipt of monies). Most significantly for our purposes, the Court clearly stated that the defintion of "branch" in section 36(f) is a matter of federal law, reasoning that:

> The policy of competitive equality is therefore firmly embedded in the statute governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation. We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36(f). Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, *Walker Bank, supra*, for in § 36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch." On this point the language of the Court of Appeals perhaps overstated the relation

> of state law to the problem, since the threshold question is to be determined as a matter of federal law. . . . In short, the definition of "branch" in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.*

396 U.S. at 133-34 (footnote omitted).

Just as in *Plant City*, protestants of the DGNB application urge that state law definitions of "bank" control. *See* Opinion Letter of Jones, Day, Reavis & Pogue (Oct. 18, 1984) ("Jones, Day letter") 7-13. I believe that the underlying reasoning of the Court in *Plant City* should likewise apply here. In holding that the definition of "branch" is a federal determination, the Court in *Plant City* sought to avoid the resulting competitive advantage which would have inured to state banks had the Court concluded that it is a matter of state law. If the *Plant City* Court had not determined that the interpretation of § 36(f) is exclusively a matter of federal law, the states could have disadvantaged national banks on matters not having the competitive effect of branching, through the expedient of labeling such matters "branching." Likewise, the concept of competitive equality requires a federal definition of "State bank" to prevent states from disadvantaging national banks vis-a-vis state-chartered institutions by merely denominating these institutions "banks" and treating them somewhat differently from state commercial banks, though not so differently as to prevent these institutions from competing with national banks.[1] Hence, for purposes of competitive equality, it is the federal definition of § 36(h) which controls.

It is also significant that the *Plant City* Court urged that, based on a policy of competitive equality, the definition of "branch" must not be read restrictively. 396 U.S.

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[1] Griffin, *Branching By National Banks: Must The "(h)" Always Be Silent?*, 3 Journal of Law and Commerce, 243, 246 (1983).

at 134. Protestants here, on the other hand, appear to believe that section 36(h) should be given a very narrow reading, one which would give limited effect to the general phrase "other such institutions or corporations carrying on the banking business under the authority of State laws." That phrase is, indeed, more open-ended than section 36(f)'s list of branching functions and suggests that section 36(h) was intended by Congress to include more than the specified types of financial institutions. Thus, if state institutions other than commercial banks, savings banks and trust companies are carrying on the banking business under authority of state laws, they should be treated as state banks for purposes of section 36.

C. Lower federal court decisions do not establish reliable precedents.

Protestants submit that the decisions of certain lower federal courts have otherwise limited the scope of section 36(h). Primarily, they rely upon *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979).[2] In *Mutschler*, the Ninth Circuit held that a national bank in the state of Washington could not branch to the extent allowed Washington savings banks. The Court concluded that only the state law concerning the limits on the branching powers of state commercial banks was incorporated by section 36 to determine the branching powers of national banks. In so doing, the Court relied squarely on the precedent established in *State Chartered Banks in Washington v. Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash. 1966), thirteen years earlier. Strangely, *Mut-*

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[2] Protestants also relied upon *First National Bank and Trust Company of Okmulgee v. Empie*, (No. 79-296-G, E.D. Okla. 1982), which followed the precedent established in *Mutschler*. *See infra.* Distribution Listfinancial institutions engaged in the business of banking.

*schler* does not even consider the possible impact of the intervening *Plant City* decision of the Supreme Court nor does it accord appropriate significance to the Congressional purpose embodied in section 36(h).

As discussed above, the Supreme Court in *Plant City* found that the definition of "branch" in section 36(f) is a matter of federal law and urged a broad reading of that term in order to ensure competitive equality as envisioned by Congress. Similarly, a broad definition of "State bank" would permit national banks to have branching powers which are coextensive with the most liberal branching powers granted to state financial institutions engaged in the business of banking. Such an approach allows a state, consistent with the underlying Congressional intent, to determine the extent to which branching is permissible within its borders, while preventing states from establishing a class of financial institutions competing with national banks for banking business which has a competitive advantage over national banks with regard to branching.

As noted above, *Mutschler* essentially reads section 36(h) out of section 36 by holding that "State bank" means only state *commercial* bank. The court instead relied on the language of section 36(c) in its holding, ignoring section 36(h). Specifically, the court reasoned that:

> Since § 36(c) requires that branching will be permitted only if expressly authorized by State statute law, an applicant wishing to branch under RCW 32.04.030 [governing branching by mutual savings banks] must satisfy all the provisions of that statute and show that it engages itself exclusively as a mutual savings bank. *State Chartered Banks v. Peoples National Bank.* Since Peoples National Bank, as a commercial bank, fails in certain particulars to satisfy all the requirements established in RCW 32.04.030 for the branching of a mutual savings bank, its application cannot be judged under

> that statute, but must, instead, be judged under RCW 30.40.020 [governing branching by state commercial banks].
>
> 607 F.2d at 279 (citation omitted).

There are several aspects of the court's reasoning that do not withstand close scrutiny. Under the *Mutschler* rationale, national banks must engage themselves "exclusively" as one type of state financial institution and satisfy all the particulars of the statute authorizing such institutions to branch. Such a restriction is not found in section 36(h), which on its face envisions that more than one type of financial institution may be considered a "State bank" for purposes of section 36, including "savings banks." The Ninth Circuit's circular logic (national banks are commercial banks and, thus, may only branch to the extent of state commercial banks) not only ignores the plain meaning of section 36(h), but evidences a misunderstanding of the scheme contemplated by Congress at the time of its enactment.

Clearly, it was not deemed necessary by Congress that national banks actually must limit themselves exclusively to the activities authorized to savings banks or trust companies in order to enjoy branching privileges similar to those institutions in states where such state-chartered institutions were allowed to branch. Had Congress intended that only state commercial bank statutes be used to measure the branching powers of national banks, section 36(h) would not have been necessary. Indeed, section 36(h) does not even specifically mention commercial banks. Its enumeration of other entities carrying on the banking business under the authority of state laws must be treated as significant. *Mutschler* failed to do so. Instead, the court relied on the *Peoples National Bank* case, *supra*, which in light of the subsequent *Plant City* case, *supra*, had accorded undue weight to state law requirements. Because of the flaws in its rationale, I do

not believe that *Mutschler* should be considered as a controlling precedent.

A more recent Tenth Circuit decision, *First National Bank and Trust Co. of Okmulgee v. Empie*, No. 78-296-C (E.D. Okla. 1982), *appeal dismissed*, No. 83-1071 (10th Cir. July 18, 1983), is flawed by its heavy reliance on *Mutschler*. In that case, the Comptroller and the national bank had argued that Oklahoma trust companies carry on "banking business under the authority of State laws" and were, therefore, "State banks" within the meaning of section 36(h).

The district court rejected this argument, saying that it was:

> unable to distinguish [*Mutschler*] from the case at bar. Trust companies in the State of Oklahoma are in the identical position as savings banks are in the State of Washington. They are separate and distinct creations from State banks. Hence, under the authority of that case, nationally-chartered banks in Oklahoma cannot branch in Oklahoma if Oklahoma state-chartered banks are prohibited from doing so . . . .

Slip. Op. at 8.

The *Okmulgee* court's rationale, thus, suffers from the same basic flaws as does *Mutschler*. It should be noted, however, that *Okmulgee* does go further in explaining why Oklahoma trust companies do not engage in the "banking business under the authority of State laws." The court states that, by law, trust companies "have never been permitted to engage in the banking business in Oklahoma." *Id.* at 8-9 n.4. To the extent that the court is merely allowing the state to define "banking business" and, thereby, "State bank," the defect in this approach has already been addressed. It is also possible to view the case as distinguishable to the extent that

Oklahoma trust companies are not authorized and do not functionally engage in the banking business. This is a reasonable interpretation due to the limited nature of the business of Oklahoma trust companies.

D. The legislative history of section 36 does not support the interpretation urged by protestants.

The *Walker Bank* case, *supra*, contains a thorough discussion of the legislative history of section 36 which need not be revisited here. Certain points concerning the legislative history raised by protestants (*see* Jones, Day letter, *supra*, at 13-14) will be addressed, however.

First, the Jones, Day letter cites a statement made by Representative McFadden that the act would result in competitive equality "among all member banks of the Federal Reserve System." 69 Cong. Rec. 5815 (1927). This statement is offered in support of the proposition that section 36(h)'s definition of "State bank" was intended to include only those financial institutions eligible for membership in the Federal Reserve System. Reliance on Representative McFadden's statement overlooks the fact that section 36, as we know it, is a result of both the McFadden Act and the Banking Act of 1933. The McFadden Act provided that, in the states that allowed state-wide branching by state-chartered institutions, national banks and state member banks were only allowed to branch within their home municipalities. Thus, the effect of the McFadden Act was limited, as indicated by Representative McFadden's statement, to achieving competitive equality among members of the Federal Reserve System. The scope of section 36 was, however, expanded under the Banking Act of 1933 by the inclusion of all state banks, whether or not members of the Federal Reserve System. In light of this context, Representative McFadden's statement offers no insight into the basic question of the definition of "State bank" for purposes of determinig branching authority.

Protestants also point to the lack of references to savings and loan associations in the legislative history relating to the branching issue. They suggest that this means that, since Congress must have been aware of the existence of such institutions and the statutes governing them and since other institutions, such as savings banks, were specifically addressed, Congress must have intended that savings and loan institutions not be included in section 36(h). This interpretation ignores the general language of section 36(h), which must, under all accepted rules of statutory construction, be given effect. *See* C. Sands, *Statutes and Statutory Construction* §§ 46.06, 47.28 and 47.37 (3d ed. 1975 and Supp. 1983). As we have stated, the actual issue is the meaning of "other such corporations or institutions carrying on the banking business under the authority of State laws." We do not suggest that in 1927 savings and loan associations were carrying on the banking business. This alone would explain the lack of discussion of such institutions in the legislative history. Protestants further suggest that savings banks were included because they were called "banks." It is interesting to note that a number of Mississippi savings associations are converting to savings banks or are changing their names to include the term "bank", presumably in recognition of their expanded powers and the current public perception of their bank-like functions. *See* Submission of Golembe Associates, Inc., Exhibit B ("Other [Mississippi] savings and loan associations have changed their name to incorporate the word bank to reflect [their] expanding financial services.").

E. Mississippi savings associations should be deemed "State banks" under 12 U.S.C. § 36(h), if they are authorized under State law, to engage in the "banking business" and are carrying on the banking business.

Mississippi savings associations should be considered "State banks" under section 36(h) if they are "corporations or institutions carrying on the banking business

under the authority of State laws." For the reasons discussed above, this issue must be analyzed as a matter of federal law, on a functional basis, always keeping in mind the competitive equality purpose behind the statute.

The first step in this analysis is determining what is meant by the term "banking business" for purposes of section 36(h). There does not appear to be any clear, universally-accepted definition of what constitutes the business of banking. One definition may be derived from the enumerated powers of national banks contained in the National Bank Act:

(1) the discounting and negotiating of promissory notes, drafts, bills of exchange, and other evidences of debt;

(2) the receiving of deposits;

(3) the buying and selling of exchange, coin and bullion;

(4) the loaning of money on personal security; and

(5) the issuing and circulating of notes under the National Bank Act.

12 U.S.C. § 24(Seventh).

The fifth item is no longer relevant since only Federal Reserve Banks now issue notes used as currency. Also, item 3 is of little relevance since it is not an important part of the business of commercial banks generally and is an activity engaged in by only a relatively small number of commercial banks. The remaining three items (1, 2, and 4) do provide the basis for defining the business of banking. Thus, the National Bank Act essentially reduces the business of banking, in perhaps its simplest form, to accepting deposits, making loans, and paying checks. This is, interestingly, the same definition found in section 36(f)'s definition of "branch," by which Congress meant to identify the core banking functions which may only be conducted at authorized branch locations.

The U.S. Supreme Court's analysis in bank merger antitrust cases is also helpful in delineating the parameters of the business of banking, since similar competitive considerations are applicable to the operation of section 36 (h).[3] These cases have described the banking business as a cluster of products and services. For example, in *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963), the Court stated that among this cluster of banking products and services:

> the creation of additional money and credit, the management of the checking system, and the furnishing of short-term business loans would appear to be the most important.

344 U.S. at 326-7.[4]

It is further enlightening to view the increasing overlap of services between commercial banks and thrift institutions in the context of recent developments in the antitrust concept of the business of banking. Initially, thrift institutions were held not within the relevant line of commerce and were not considered in the evaluation of the competitive effects of bank mergers. In *U.S. v. First National State Bancorporation*, 499 F. Supp. 793 (D.N.J. 1980), the court still refused to expand the relevant line of commerce to include thrifts. The court's functional approach, however, left open the possibility that future analysis could lead to a different result, stressing that, in

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[3] The reference to these antitrust cases is intended to provide a useful analogy. Such reference is not a suggestion by this Office that they offer a conclusive definition of commercial banking or that banks, particularly national banks, must offer all of the products or services included within the relevant line of commerce under those cases.

[4] *See also, e.g., U.S. v. Connecticut National Bank*, 418 U.S. 656, 663 (1974); *U.S. v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350, 359-62 (1970); *U.S. v. First National Bank and Trust Co. of Lexington*, 376 U.S. 665, 667 (1964).

1980, commercial banks were the only financial institutions able to offer an "entire menu" of financial services.

Most recent decisions of this Office and the Federal Reserve Board have found in the expanded powers of thrifts since the Depository Institutions Deregulation and Monetary Control Act of 1980 and the Garn-St Germain Depository Institutions Act of 1982 significant erosion of commercial banking as a separate line of commerce. *See, e.g., First Tennessee National Corporation*, 69 Fed. Res. Bull. 299 (Mar. 31, 1983) (thrifts have, or have the potential to, become "major competitors" of banks); *Decision of the Comptroller on the Application to Merge the Connecticut Bank and Trust Company, Hartford, Connecticut, into the State National Bank of Connecticut, Bridgeport, Connecticut, under the Charter of the Latter and the Title of "Connecticut Bank and Trust Company"* (Dec. 1, 1982) (thrifts considered in competitive analysis). *See also*, Sayers, *Bank Expansion and Probable Future Competition*, 102 Banking L.J. 100 (1985); Vartanian, *Potential Competition and Bank Mergers: Defense Blueprint for the 1980's*, 99 Banking Law Journal 882, 901 (1982) ("The 1980 Act makes clear the congressional intent that thrift institutions and commercial banks be placed in a position of competitive parity").

The next component of the analysis involves determining the authority of Mississippi savings associations to engage in the business of banking under state laws. The expanded powers of thrift institutions which resulted from those recent legislative changes that have previously been referred to, as well as changes enacted by the state legislature, constitute an "entire menu" of financial services, including the essential functions of accepting deposits, making loans and paying checks (or their functional equivalents, negotiable orders of withdrawal). Specifically, Mississippi savings associations are empowered, *inter alia*, to:

- Accept savings accounts [deposits] (Miss. Code of 1972, Ann. § 81-12-49(d));
- Pay interest on deposits and other accounts (Miss. Code of 1972, Ann. § 81-12-49(d));
- Act in a fiduciary capacity for customers (Miss. Code of 1972, Ann. § 81-12-49(o));
- Offer NOW Accounts (Miss. Code of 1972, Ann. § 81-12-149; § 81-12-151);
- Service loans and investments for others (Miss. Code of 1972, Ann. § 81-12-49(n));
- Pay earnings on savings accounts (Miss. Code of 1972, Ann. § 81-12-149);
- To sell money orders, travelers checks or similar instruments (Miss. Code of 1972, Ann. § 81-12-49(l));
- To lend and invest funds (Miss. Code of 1972, Ann. § 81-12-49(p));
- Allow withdrawal of all or any part of savings accounts upon written request (Miss. Code of 1972, Ann. § 81-12-151); and
- To purchase, sell, lease or mortgage personal or real property (Miss. Code of 1972, Ann. § 81-12-49(c)).

In addition to the above powers, Mississippi savings associations "possess such of the rights, powers, privileges, immunities, duties and obligations of federal savings and loan associations." Miss. Code of 1972, Ann., § 81-12-49(r). Following the enactment of the Garn-St Germain Act, Pub. L. No. 97-320, federally-chartered savings and loans may, *inter alia*,

- Offer demand deposits to businesses that have, at some time, had a loan relationship with the savings and loan (12 U.S.C. § 1464(b)(1));

- Make commercial loans of up to 5% of assets before January 1, 1984, and of up to 10% of assets after that date (12 U.S.C. § 1464(c)(1)(R); and
- Make investments in tangible personal property of up to 10% of assets for purposes of rental or sale (12 U.S.C. § 1464(c)(2)(A).

In light of the above statutory authority, it is apparent that Mississippi-chartered savings associations are not institutions whose powers are limited to providing mortgage credit, as savings and loan associations were traditionally restricted. Rather, they are institutions which are permitted to offer a broad range of financial services and products. Among the products and services which may be offered by Mississippi savings associations are those which, as discussed earlier, appear to be essential to the banking business, *i.e.*, the accepting of demand deposits, the making of commercial and other non-mortgage loans and the accepting of time and savings deposits. These powers enable Mississippi savings associations to perform essentially the same functions and services that are provided by commercial banks.

In determining whether Mississippi savings associations are carrying on the business of banking, the final stage of our analysis, we must look to the record developed in connection with this application, chiefly the submission of Golembe Associates, Inc. (Sept. 6, 1984) ("Golembe Report"). DGNB retained Golembe Associates, Inc. to conduct an independent study into "whether Mississippi's state-chartered savings and loan associations should be classified as state banks for purposes of the McFadden Act restrictions on national bank branching." Golembe Report, Preface. During July and August of 1984, Golembe Associates conducted interviews with senior executives at a half-dozen of Mississippi's larger savings institutions and reviewed financial data and other publicly available information on federally-and state-chartered as-

sociations throughout the state. In its conclusion, that Mississippi savings associations are state banks for purposes of the McFadden Act, Golembe Associates drew on its study, as well as "its general knowledge of the banking industry." *Id.* Also included in the record is the Declaration of John P. Danforth ("Danforth Declaration"), a Senior Associate at Golembe Associates, who had primary responsibility for the preparation of the Golembe Report. In his statement, Mr. Danforth discussed certain additional data, including the results of two surveys completed after submission of the report.

The Golembe Report, as supplemented by the Danforth Declaration, concludes that Mississippi savings associations are carrying on the business of banking. Briefly, Golembe Associates found that Mississippi associations are currently offering a range of products and services in competition with commercial banks, including NOW accounts, auto and other consumer loans, construction loans, and commercial loans. *See* Danforth Declaration, Exhibit C. Furthermore, Mississippi savings associations have been actively marketing such products and services, often referring to them as "banking" products and services or to themselves as "banks." *See* Golembe Report, Exhibits C, D and E.

The Golembe submissions also provide certain quantifiable data. The report contains figures which indicate that, in the consumer banking area, Mississippi savings associations are more active than are all FSLIC insured savings and loan associations generally. For example, while the national group has only 3.5% of its deposits in transaction accounts, Mississippi associations had 12.2% of their deposits in such accounts, indicating success in marketing checking services, according to the report. Also, a telephone survey of 300 households in the Jackson, Mississippi area found that 82 of those households obtained some of their banking services from Mississippi savings associations, with 21 of 300 households having

their primary checking needs met by a savings association. Danforth Declaration at 3.

Based on the foregoing, it is clear that Mississippi-chartered savings associations now offer a range of products and services that constitute the "business of banking." Due to the relatively recent expansion of the authority to engage in certain of those activities, the level of activity is not fully quantified in the record. The language of 12 U.S.C. § 36 does not, however, require a showing of a specific level of competitive impact. Mississippi savings associations are, in fact, carrying on the business of banking under authority of state laws. Thus, I conclude that Mississippi savings associations are "State banks," as defined in section 36(h).

## V. CONCLUSION

Since I have determined that Mississippi savings associations are authorized to carry on the business of banking under state laws and are carrying on that business, such associations are "State banks" for purposes of 12 U.S.C. § 36(h). National banks in Mississippi may, thus, branch to the same extent as Mississippi savings associations, *i.e.*, statewide. Therefore, because it conforms to the policies of this Office and is consistent with applicable law, this application is approved.

/s/ Michael A. Mancusi
MICHAEL A. MANCUSI
Senior Deputy Comptroller
for National Operations

July 9, 1985
Date

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
JACKSON DIVISION

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Civ. A. No. J85-0698(L)

THE DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
*Plaintiff,*

GULF NATIONAL BANK, MERCHANTS BANK & TRUST COMPANY, HANCOCK BANK, PEOPLES BANK OF BILOXI, BANK OF WIGGINS, THE PEOPLES BANK & TRUST COMPANY, AND BANK OF MISSISSIPPI,
*Plaintiffs-Intervenors,*

v.

JOE SELBY, ACTING COMPTROLLER OF THE CURRENCY OF THE UNITED STATES and DEPOSIT GUARANTY NATIONAL BANK,
*Defendants.*

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Aug. 27, 1985

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Edwin Lloyd Pittman, Robert Arentson, Stephen J. Kirchmayr, Office of the Attorney General, Hubbard T. Saunders, Champ Terney, Donald Clark, Jr., Crosthwait, Terney & Noble, Jackson, Miss., for the Department.

G.E. Estes, Jr., Estes & Estes, Gulfport, Miss., for Merchants Bank & Trust.

John M. Harral, White & Morse, Gulfport, Miss., for Hancock, Bank of Wiggins, Peoples, Peoples Bank & Trust and Bank of Mississippi.

W. Joel Blass, Mize, Thompson & Blass, Gulfport, Miss., for Gulf National Bank.

Frank A. Riley, Riley, Weir & Caldwell, Tupelo, Miss., for Bank of MS, Tupelo.

George Phillips (Danny McDaniel), U.S. Atty., Jackson, Miss., David H. White, U.S. Atty., Dept. of Justice, Mark Leemon, Office of Comptroller of the Currency, Washington, D.C., for Comptroller.

Robert C. Cannada, Lawrence J. Franck, Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Miss., for Deposit Guaranty.

MEMORANDUM OPINION

TOM S. LEE, District Judge.

Deposit Guaranty National Bank (DGNB) is a federally chartered banking association with its principal office in Jackson, Mississippi. DGNB applied to the Comptroller of the Currency of the United States (Comptroller) for permission to establish a branch office in Gulfport, Mississippi, which is approximately 170 miles from Jackson. On July 9, 1985, following review of DGNB's application and comments submitted by various parties, the Comptroller approved the application. The Department of Banking and Consumer Finance of the State of Mississippi (Department), an agency of the State of Mississippi charged with the responsibility of administering all laws relating to corporations carrying on the banking business in the state,[1] advised the Comptroller during the comment period that approval of the proposed branch would violate Mississippi law. Following approval of the application, the Department brought this action

[1] Miss.Code Ann. § 81-1-59 (Supp. 1984).

against DGNB and Joe Selby, Acting Comptroller of the Currency of the United States, to enjoin opening of the branch and, following briefing and argument, the court granted the Department's motion for a temporary restraining order. By agreed order, the parties have treated the temporary restraining order as a preliminary injunction pending an expedited briefing schedule and hearing on the merits of the case pursuant to Federal Rule of Civil Procedure 65. Gulf National Bank, Merchants Bank & Trust Company, Hancock Bank, Peoples Bank of Biloxi, Bank of Wiggins, The Peoples Bank & Trust Company and Bank of Mississippi were allowed to intervene as plaintiffs.[2] The parties extensively briefed the issues and the court heard argument August 20, 1985.

The McFadden Act provides in part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency. establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
>
> * * * * * *
>
> (h) The words "State bank" "State banks," "bank" or "banks," as used in the section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

12 U.S.C. § 36.

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[2] Use of the word "plaintiffs" hereinafter refers to plaintiff Department and plaintiff-intervenors.

In Mississippi, a state-chartered commercial bank may operate branch banks in the county where its principal office is located, in any county adjacent to the county in which its principal office is located or within a 100-mile radius of the bank's principal office. Miss.Code Ann. §§ 81-7-5 & -7 (1972). Mississippi savings associations, however, may branch statewide. Miss.Code Ann. § 81-12-175 (Supp.1984). The Comptroller determined, based on cases and statutes defining the business of banking in other contexts and a study of the banking industry in Mississippi submitted by DGNB, that savings associations in Mississippi are engaged in the business of banking and are, therefore, "State banks" as defined in § 36(h). The Comptroller concluded that "[n]ational banks in Mississippi may, thus, branch to the same extent as Mississippi savings associations, *i.e.*, statewide." Decision of Comptroller at 31.

The scope of this court's review of the Comptroller's decision is governed by 5 U.S.C. § 706 which provides in part:

> The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

*See Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). Only questions of fact are subject to the "arbitrary and capricious" standard; "questions of law . . . are freely reviewable by the courts." *Coca-Cola Co. v. Atchison, Top. & S.F. Ry. Co.*, 608 F.2d 213, 218 (5th Cir.1979). Review is further limited to the administrative record made in the proceedings before the Comptroller. *Camp v. Pitts*, 411 U.S. at 142, 93 S.Ct. at 1244.

The Comptroller's decision involves questions of law regarding construction of the controlling statute and questions of fact regarding the Comptroller's determination that Mississippi savings associations carry on the banking business. Because this court concludes that the Comptroller's construction of § 36(h) is not in accordance with law, consideration of his factual findings is unnecessary.

Defendants contend that the Comptroller's interpretation of § 36(h) is in accordance with law. The § 36(h) definition, according to the defendants, is a functional one, to be applied by determining what entities carry on the business of banking; reference in § 36(h) to the "authority of state laws" is intended only to distinguish state from national banks and not to impose a state law definition of the banking business. Defendants rely on *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), wherein the United States Supreme Court stated that federal law governs the § 36(f) definition of "branch"[3] since the use of state law definition in that regard would allow the states to be "the sole judges of their own powers" under the McFadden Act. *Id.* at 133, 90 S.Ct. at 343.

Plaintiffs argue that § 36(h) includes as state banks only those entities which are expressly chartered to carry on the banking business by state law. Section 81-3-3 of the Mississippi Code Annotated provides in part:

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[3] 12 U.S.C. § 36(f) provides:

> (f) the term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Plaintiffs note that § 36(f) contains no reference to state law whereas § 36(h) does.

> Every corporation organized under the laws of this state for the purpose of conducting or carrying on a commercial banking business, or the business of a savings bank, or trust company, or the exercise of trust powers as defined in this title, or any combination thereof, shall be subject to supervision by the department of bank supervision and the state comptroller, and to assessments for the maintenance of said department as provided by law.

State-chartered savings associations are not under the supervision of the Department and, according to plaintiffs, are, therefore, not "State banks" within the meaning of § 36(h).

While plaintiffs' construction of the statute is not entirely persuasive, the court concludes that the legislative history of the McFadden Act and policy considerations weigh heavily in their favor.[4]

In *First National Bank v. Walker Bank & Trust Company*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966), the United States Supreme Court examined the legislative history of the McFadden Act. In 1923, apparently due to a substantial increase in the number of branch banks, the Comptroller recommended congressional action on branch banking. Action was not taken, however, until 1927 with the adoption of the McFadden Act. *Walker Bank*, 385 U.S. at 258, 87 S.Ct. at 495. The sponsor of the bill, Representative McFadden, stated at the time of enactment:

> As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been estab-

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[4] Review of legislative history and public policy is helpful in cases of statutory construction. *See, e.g.*, Sutherland Stat.Constrn. §§ 45.05, 45.06 & 45.09 (4th ed.).

> lished among all member banks of the Federal reserve system. 68 Cong.Rec. 5815 (1927).

*Walker Bank*, 385 U.S. at 258, 87 S.Ct. at 495. The 1927 bill allowed national banks to branch in cities where state banks were allowed by state law to do so and limited state bank members of the Federal Reserve system to "inside" branches.[5] *Id.* In 1931, a bill to allow national banks to branch irrespective of state law was introduced. It met strenuous opposition and was eventually defeated. *Id.* at 259, 87 S.Ct. at 496. The Banking Act of 1933 abolished the limitation on state banks included in the 1927 Act and, as Senator Glass stated on the Senate floor, "[permitted national banks to branch] only in those States and to the extent that the State laws permitted branch banking." *Walker Bank*, 385 U.S. at 259, 87 S.Ct. at 496 (quoting 76 Cong.Rec. 2511 (1933)). The *Walker Bank* Court concluded that "Congress intended to place national and state banks on the basis of 'competitive equality' insofar as branch banking was concerned." *Walker Bank*, 385 U.S. at 261, 87 S.Ct. at 497.

In *First National Bank of Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), the Comptroller had approved a national bank's application to provide armored car services and to establish an off-premises depository. The Florida Banking Commissioner notified the bank that those services violated Florida law which restricted the business of banking to the main banking facility. The United States Supreme Court stated:

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[5] The legislative history and the Act itself are devoid of specific reference to savings and loan associations. Reference was made during debates, however, to the fact that national banks in Missouri would have limited branching power because Missouri imposed such restrictions on state commercial banks. 66 Cong.Rec. 1568 and 1764 (1925). At that time Missouri authorized more extensive branching by savings and loan associations. *See* Laws of Mo., 1925, p. 152.

> Here we are confronted by a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks. The utility of the armored car service and deposit receptacle are obvious; many States permit state chartered banks to use this eminently sensible mode of operations, but Florida's policy is not open to judicial review any more than is the congressional policy of "competitive equality." Nor is the congressional policy of competitive equality with its deference to state standards open to modification by the Comptroller of the Currency.

*Id.* at 138, 90 S.Ct. at 345.

The Comptroller's decision before this court reflects a similar attempt to obtain for national banks a competitive advantage.[6] Mississippi legislation allowing state savings associations greater branching privileges than those of state commercial banks reflects state policy considerations which are not subject to modification by the Comptroller or by this court.[7] That is a responsibility which rests with the Mississippi legislature or with Congress.[8] Certainly there are differences in the ability of

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[6] In *Plant City*, the Comptroller had determined that the services offered by the bank were not branches within the § 36(f) definition and, therefore, not subject to the state law prohibition. Defendants rely on *Plant City* contending that it holds that federal law and not state law is to be used to define "branch," a proposition to which all litigants in the case agreed. *See id.* at 134, n. 7, To determine whether, under federal law, the services offered constituted a branch, the court looked not only to the language of the statute, but also to the statutory purpose of mainaining competitive equality. *See id.* at 136, 90 S.Ct. at 344.

[7] The branching provisions relevant to commercial banks and savings associations are parts of a legislative scheme devised by the Mississippi legislature to insure that both types of institutions will provide the best service to Mississippi consumers.

[8] DGNB initially approached the Mississippi legislature to advocate changes in the state's branching laws. The legislature apparently decided that the proposed changes were not in the best interest of the state.

commercial banks and savings associations to branch in Mississippi; savings associations may branch statewide whereas commercial banks, state and national, are limited geographically.[9] The Comptroller's decision, however, does not abolish these differences; it merely adjusts the situation so that national commercial banks may branch statewide, leaving only state banks subject to the state law limitations. Defendants contend that any inequality between state and national commercial banks which may be created by the Comptroller's decision could be quickly remedied by Mississippi Code Annotated § 81-5-1(10), which allows state banks to operate branches wherever national banks are allowed to do so. Assuming that defendants are correct in their interpretation of Mississippi law,[10] forcing a state to make such a change is clearly not in furtherance of the purpose of the McFadden Act.[11] The McFadden Act and its legislative history, according to the defendants, reflect a continuing intent to increase the powers of national banks. The McFadden Act, however, actually is intended to preserve a dual banking system,[12] an intent which obviously

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[9] It should be noted that Congress likewise has established different branching powers for national banks and federal savings and loan associations. Whereas the McFadden Act limits branching by national banks to the extent allowed state banks. The Federal Home Loan Bank Board may permit branching by federal savings and loan irrespective of state governing state savings and loans. *See Independent Bankers Ass'n v. FHLBB*, 557 F.Supp. 23, 26 (D.D.C. 1982).

[10] Even if defendants are not correct, it is arguable that, if DGNB were allowed to open its branch office in Gulfport, the Mississippi Legislature would be under pressure to enact legislation that would allow state banks to do the same.

[11] This is particularly true when the state's legislature has recently refused to make such a change.

[12] See *Plant City*, 385 U.S. at 131, 90 S.Ct. at 342. That defendants are not correct is reflected by the sound defeat of the 1931 bill which would have allowed national banks to branch irrespective

is not furthered by a decision of the Comptroller that would force a state to change state law in order to preserve its state banking system.[13]

The Comptroller is charged with enforcement of the Act, and for that reason, his decision is entitled to "considerable respect." [14] *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980). In *Independent Bankers Association v. Marine Midland Bank*, 757 F.2d 453, 561 (2nd Cir.1985), the court considered a decision of the Comptroller which was in accord with his past rulings on which national banks and other parties had relied. Such is not the case here where the Comptroller's decision, while similar to past rulings, has never been upheld by a court. *See Mutschler v. Peoples National Bank*, 607 F.2d 274 (9th Cir. 1979); *Dakota National Bank & Trust Co. v. First National Bank & Trust Co.*, 554 F.2d 345 (8th Cir), *cert. denied*, 434 U.S. 877, 98 S.Ct. 229, 54 L.Ed.2d 157 (1977); *First National Bank & Trust Co. v. Empie*, No. 78-296-C (E.D.Okla., Nov. 15 & Dec. 17, 1982); *State Chartered Banks in Washington v. Peoples National Bank*, 291 F.Supp. 180 (W.D.Wash.1966).[15] Hence the

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of state law. Additionally, the *Walker Bank* Court began its discussion of the background of the National Bank Act by stating: "There has long been opposition to the exercise of federal power in the banking field." *Walker Bank*, 385 U.S. at 256, 87 S.Ct. at 495.

[13] Mississippi's state commercial banking system would be jeopardized in that state commercial banks would be prompted to convert their charters to enable them to compete in the commercial banking market.

[14] *But see Plant City*, 385 U.S. at 138, n. 11, 90 S.Ct. at 345, n. 11 (statements regarding Comptroller's attempts to allow national banks to branch beyond limits of state law).

[15] This court is of the opinion that the substantive analyses utilized in these cases is not controlling for each case fails to address directly the question in issue here. In addition to showing that the Comptroller's position has been rejected by every court

reliance interest found to be significant in *Marine Midland* is not a factor to be considered here.

This court is, accordingly, of the opinion that the Comptroller's decision is not in accordance with law and cannot be upheld. It is, therefore, ordered that defendant Comptroller is prohibited from issuing a certificate of authority authorizing DGNB to establish and operate a branch banking office in Gulfport, Mississippi and defendant DGNB is prohibited from establishing and operating a branch banking office in Gulfport, Mississippi.

Plaintiffs shall prepare a judgment pursuant to the local rules and submit to defendants for approval as to form.

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that has considered it, the cases are relevant in that, following their dispositions, Congress has not taken any action to change the law through new legislation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

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Civil Action No. J85-0698(L)

THE DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
*Plaintiff,*

GULF NATIONAL BANK, MERCHANTS BANK & TRUST COMPANY, HANCOCK BANK, PEOPLES BANK OF BILOXI, BANK OF WIGGINS, THE PEOPLES BANK & TRUST COMPANY, and BANK OF MISSISSIPPI,
*Plaintiffs-Intervenors,*

v.

JOE SELBY, ACTING COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,
*Defendants.*

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[Filed Sept. 16, 1985]

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JUDGMENT

The civil action having been submitted pursuant to Fed. R. Civ. P. 65 and the agreement of the parties for decision by the court on the merits based upon the administrative record, pleadings, briefs, and the oral argument of counsel on August 20, 1985, and the court, having filed its Memorandum Opinion on the merits of this

case on August 28, 1985, and for the reasons stated therein,

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:

1. That the Motion by Defendant Selby for Summary Judgment is hereby DENIED;

2. That the July 9, 1985, Decision of the Comptroller of the Currency on the Application of Deposit Guaranty National Bank, Jackson, Mississippi, to Establish a Branch Office in Gulfport, Mississippi, R. 2-31, is UNLAWFUL and, therefore, NULL and VOID and is hereby VACATED and SET ASIDE;

3. That Defendant H. Joe Selby, in his official capacity as Acting Comptroller of the Currency, his successors in office, agents, servants, employees, attorneys, and all those persons acting in active concert or participation with them are hereby permanently ENJOINED and PROHIBITED from taking any action which would authorize Deposit Guaranty National Bank to establish or operate a branch banking office in the City of Gulfport, Harrison County, Mississippi;

4. That Defendant Deposit Guaranty National Bank and its officers, directors, agents, servants, employees, attorneys, and all those persons acting in active concert or participation with them are hereby permanently ENJOINED and PROHIBITED from establishing or operating a branch banking office in the City of Gulfport, Harrison County, Mississippi; and

5. That all costs incurred in this action are hereby assessed against Defendants H. Joe Selby, in his official capacity as Acting Comptroller of the Currency, and Deposit Guaranty National Bank, jointly and severally.

SO ORDERED, ADJUDGED, AND DECREED, on this, the 9th day of September, 1985.

/s/ Tom S. Lee
United States District Judge

APPROVED AS TO FORM:

/s/ Stephen J. Kirchmayr
by HTS, IV †
Attorney for Plaintiff

/s/ Hubbard F. Saunders, IV
Attorney for Plaintiff

George L. Phillips
United States Attorney

By: /s/ Daniel M. McDaniel, Jr.
DANIEL M. MCDANIEL, JR.
Assistant United States Attorney
Attorney for Defendant
H. Joe Selby in his official capacity as Acting Comptroller of the Currency

/s/ John M. Harral
by HTS, IV *
Attorney for Plaintiff-Intervenors
Hancock Bank, Peoples Bank of Biloxi, Bank of Wiggins, The Peoples Bank & Trust Company, and Bank of Mississippi

/s/ W. Joel Blass
by HTS, IV *
Attorney for Plaintiff-Intervenor
Gulf National Bank

/s/ G. E. Estes, Jr.
by HTS, IV *
Attorney for Plaintiff-Intervenor
Merchants Bank & Trust Company

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* Per 9-5-85 telephone authorization.

† Per 9-6-85 telephone authorization.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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No. 85-4722

THE DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI, *et al.*,
*Plaintiffs-Appellees,*

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES and DEPOSIT GUARANTY NATIONAL BANK,
*Defendants-Appellants.*

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Feb. 9, 1987

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Anthony J. Steinmeyer, Appellate Staff, Civil Div., Dept. of Justice, Washington, D.C., Dan M. McDaniel, Jr., Asst. U.S. Atty., John F. Daly, Jackson, Miss., for Controller of Currency.

Luther T. Munford, Lawrence J. Franck, Jackson, Miss., for Deposit Guar. Bank

Hubbard T. Saunders, Stephen J. Kirchmayr, Jr., Robert M. Arentson, Jr., Champ Terney, Jackson, Miss., for Dept. of Banking.

G.E. Estes, Jr., Gulfport, Miss., for Merchants Bank.

John M. Harral, Knox White, Gulfport, Miss., for Hancock Bank, et al.

W. Joel Blass, Gulfport, Miss., for Gulf Nat'l. Bank.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, RANDALL, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

This appeal by the Comptroller of the Currency of the United States and Deposit Guaranty National Bank of Jackson, Mississippi, from a judgment enjoining the Comptroller and Deposit Guaranty from establishing a branch office in Gulfport, Mississippi, poses a sole question: did the Comptroller err in his interpretation of the term "State bank" as found in 12 U.S.C. § 36(h), when he granted approval of Deposit Guaranty's application to establish the branch? The district court concluded that the Comptroller had erred. We disagree and reverse.

*Background*

In September 1984 Deposit Guaranty, a national banking corporation chartered under the laws of the United States with its principal office in Jackson, Mississippi, applied to the Comptroller for permission to open a branch bank in Gulfport, Mississippi. Gulfport is more than 100 miles distant from Jackson. During the public comment period following the publication of notice of Deposit Guaranty's application, the Department of Banking and Consumer Finance of the State of Mississippi and several state-chartered commercial banks with offices in or near Gulfport protested. On July 9, 1985, the Comptroller rejected the protests and granted the requested approval. The Department of Banking promptly filed the instant action, seeking to enjoin the opening of the Gulfport branch. Several state commercial banks were allowed to intervene. After reviewing the record developed before the Comptroller, the district court granted the injunctive relief. Both the Comptroller and Deposit Guaranty timely appealed.

Like most states, the State of Mississippi has historically recognized and chartered two kinds of financial institutions, commercial banks and savings associations. The commercial banks are chartered under Miss.Code Ann. § 81-3-3 and are regulated by the Department of Banking. The savings associations are chartered under Miss.Code Ann §§ 81-12-25 to 81-12-43 and are under the authority of the Mississippi Department of Savings Associations, Miss.Code Ann. § 81-12-11. Originally the financial activities of the two institutions differed. In recent years, however, because of changes in state and federal law, the savings associations have become highly competitive with the state banks and other financial institutions, including national banks.

The traditional powers and functions of a bank, constituting the business of banking, are enumerated in the National Bank Act, 12 U.S.C. § 24 (seventh):

(1) the discounting and negotiating of promissory notes, drafts, bills of exchanges, and other evidence of debt;

(2) the receiving of deposits;

(3) the buying and selling of exchange, coin and bullion;

(4) the loaning of money on personal security; and

(5) the issuing and circulating of notes under the National Bank Act.

As is noted by the Comptroller and generally acknowledged, items (3) and (5) are of little relevance. Hence, the banking business, reduced to essentials, involves receiving deposits, making commercial loans, and negotiating checks and drafts.

Starting in 1980, Mississippi's statutes and regulations dramatically changed, conferring traditional banking powers upon Mississippi savings associations which are

now authorized to: offer negotiable order of withdrawal (NOW) accounts and interest-bearing checking accounts, Miss.Code Ann. §§ 81-12-149, 81-12-151; receive and pay interest on savings deposits and other accounts, Miss. Code Ann. § 81-12-49(d); lend and invest funds, Miss. Code Ann. §§ 81-12-49(p), 81-12-155, 81-12-159; service loans and investments, Miss.Code Ann. § 81-12-49(n); and sell money orders and travelers' checks, Miss.Code Ann. § 81-12-49(*l*). Under what is sometimes referred to as the "wild card" statute, Miss.Code Ann. § 81-12-49(r), Mississippi savings associations may engage in any activity permitted a federally chartered savings and loan association in that state. And, of some significance, savings associations may now use the appellation "savings bank," contrary to the former law reserving the title "bank" for commercial banking institutions. Miss.Code Ann. § 81-3-3; Miss Savings Rule 16.1.

Consistent with the previous sharp separation of functions, banks and savings associations were accorded different treatment. One difference central to the case at bar involves branch units. A savings association may open branches throughout the state, Miss.Code Ann. § 81-12-175, whereas the state commercial banks, since the 1986 amendments, are allowed to open branches only in the county in which the bank's principal office is located, or within a 100-mile radius, Miss.Code Ann. § 81-7-7.

The Comptroller is responsible for the supervision of 5,000 national banks chartered under federal law. Congress has empowered the Comptroller to make definitive judgments on the application of national banks for permission to relocate or to open branches, 12 U.S.C. §§ 30, 36. The federal branching provision, commonly referred to as the McFadden Act, permits a national bank to open branches anywhere that a state bank may. The National Bank Act, 12 U.S.C. § 36, provides in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, estab-

> lish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
>
> * * * * * *
>
> (h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

In his consideration of the application of Deposit Guaranty for permission to open a Gulfport branch, the Comptroller received in evidence a study of the banking industry in Mississippi reflecting that savings associations offered traditional banking services such as, *inter alia*, interest-bearing checking accounts, commercial checking accounts, consumer loans, business and construction loans, savings deposits, and related incidental services. After considering the evidence presented, applicable federal and state statutes and regulations, and the relevant jurisprudence, the Comptroller determined that savings associations in Mississippi were engaged in the business of banking and were "State banks" within the meaning of 12 U.S.C. § 36(h). The Comptroller accordingly concluded that "[n]ational banks in Mississippi may, thus, branch to the same extent as Mississippi savings associations, *i.e.*, statewide." We are charged to uphold the Comptroller's determination if we find it to be a "permissible construction" of the National Bank Act. *See Chevron v. Natural Rescurces Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *Texas v. United States*, 756 F.2d 419 (5th Cir.),

*cert. denied*, —— U.S. ——, 106 S.Ct. 129, 88 L.Ed.2d 106 (1985). In reaching his conclusion the Comptroller applied a federal definition of banking, eschewed state-applied labels, and looked primarily to the function of the institutions.

*Analysis*

The threshold issue we confront is whether the Comptroller, in his interpretation and application of a federal statute, in this case 12 U.S.C. § 36(h), should look to state or federal law to define the statute's terms. We conclude and hold that in his interpretation of 12 U.S.C. § 36(c) and (h) the Comptroller may seek the guidance of helpful state law, but is bound to follow federal law in defining terms contained in the federal statute. This includes, of course, the terms "State bank" and "banking business."

The Supreme Court's reasoning in *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966), illuminates our path. The Court there held that national banks in Utah were constrained to establish branches in the same manner as state banks in that state. The Court opined that "[i]t appears clear from . . . the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." 385 U.S. at 261, 87 S.Ct. at 497. It was this concern for competitive equality that drove the Court's decision in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), wherein it held that the definition of "branch" in 12 U.S.C. § 36 was a matter of federal law.

In *Plant City*, the Court emphasized the importance of employing a federal definition to ensure that national banks would be able to perform the same branching functions as neighboring state banks. The Court relied on the

legislative history of the McFadden Act, codified as 12 U.S.C. § 36, reasoning that to allow the states to regulate banking functions "would make them the sole judges of their own powers. Congress did not intend such an improbable result. . . ." 396 U.S. at 133-34, 90 S.Ct. at 343. The court cited legislative history demonstrating that Congress was concerned that "neither system have advantages over the other in the use of branch banking" and that national banks would be protected "from the unrestricted branch bank competition of state banks." *Id.* at 131, 90 S.Ct. at 342.[1]

The principle of competitive equality guided the Comptroller's analysis and informed his decision in the present case. He observed that "the concept of competitive equality requires a federal definition of 'State bank' to prevent states from disadvantaging national banks vis-a-vis state-chartered institutions by merely denominating these institutions 'banks' and treating them somewhat differently from state commercial banks, though not so differently as to prevent these institutions from competing with national banks."

We conclude that the Comptroller's use of federal law and the competitive equality standard was legally correct. By doing so the Comptroller was faithful to the congressional mandate and demonstrated considerable expertise in balancing national and state interests in this constantly evolving area.

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[1] In other areas traditionally regulated by state law, the Supreme Court has applied federal definitions to federal statutory terms even when the federal statute contains references to state law provisions. *See Chase Manhattan Bank v. City Finance Admin.*, 440 U.S. 447, 99 S.Ct. 1201, 59 L.Ed.2d 445 (1979) (definition of "tax" under federal statute governing state taxation is a question of federal law); *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959) (definitions of "insurance" and "annuities" for purposes of federal regulation are questions of federal law even if such definitions work to displace or hinder state regulation).

*Function versus Title*

Having concluded that the federal definition of banking business controls the meaning of that term in § 36 (h), we must now determine whether the Comptroller correctly placed the Mississippi savings associations within that subsection. The Comptroller looked to function and found as a fact that the savings associations were engaged in the banking business. The district court did not address those factual findings.

We agree with the Comptroller that the language of § 36(h) expressly requires a consideration of function. The statute directs that the term "State bank," as used therein, "shall be held to include . . . corporations or institutions carrying on the banking business under the authority of state laws." We hold that the Comptroller was statutorily mandated to determine whether the Mississippi savings associations, some of which publicly refer to themselves as "savings banks," were actually "carrying on the banking business." This task could only be accomplished by a targeted functional analysis.[2] The very recent Supreme Court decision in *Clarke v. Securities Industry Association*, —— U.S. ——, 107 S.Ct. 750, —— L.Ed.2d —— 1987), implicitly supports the Comptroller's use of this functional analysis methodology.

As noted above, Congress has defined the business of banking, stripped to its essentials, as accepting deposits, paying checks, and making loans. As observed by the Comptroller, these three primary functions are listed in

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[2] Our colleagues in the District of Columbia Circuit used this approach in defining "branch" in *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C.Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 141 (1976). There, the court determined that all bank offices, state or national, that perform any one of three branch banking services, are "branches" for purposes of the National Bank Act, regardless of the offices' actual labels. Thus, for example, automatic teller machines constitute "branches" for purposes of the Act.

the National Bank Act's definition of branch in 12 U.S.C. § 36(f).[3]

As a reviewing court, we must accept the Comptroller's factual findings unless we find that they are arbitrary or capricious. 5 U.S.C. § 706. Our determination must be made on the basis of the administrative record. *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

The Comptroller's factual determination that the savings associations are engaged in the banking business is amply supported by the record. These associations, consistent with state law, accept deposits, pay interest on accounts, offer checking accounts, act in a fiduciary capacity, make personal loans, sell money orders and travelers' checks, service loans, manage investments, honor withdrawals from savings accounts, and purchase, sell, lease, and mortgage both personal and real properties. This factual finding by the Comptroller is neither arbitrary nor capricious. It is patently correct.

In reaching our conclusion we are not unmindful of the Garn-St. Germain Act, adopted in 1982, 12 U.S.C. § 1461 *et seq.*, expanding the regulatory scheme for savings and loan associations. That regulatory scheme, intended to ensure that savings and loan institutions main-

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[3] The Supreme Court has defined "banking business" similarly in antitrust cases. In *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), the Court stated that of the various banking services and products,

> the creation of additional money and credit, the management of the checking account system, and the furnishing of short-term business loans would appear to be the most important.

374 U.S. at 326-27, 83 S.Ct. at 1721. The Court has repeated this delineation of banking functions in subsequent antitrust cases, *see, e.g., United States v. Phillipsburg National Bank*, 399 U.S. 350, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970); *United States v. First National Bank*, 376 U.S. 665, 84 S.Ct. 1033, 12 L.Ed.2d 1 (1964).

tain their status "as the nation's primary home lender," S.Rep. No. 641, 97th Cong.2d Sess. 88, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, 3131, differs from the regulation of the traditional bank. The principal difference involves the limits placed on the commercial and consumer loans and investments of the savings institutions, designed to protect their capacity to make needed home loans. That legislation neither proscribes the functional analysis made by the Comptroller nor militates against his interpretation of 12 U.S.C. § 36(h).

The Comptroller did not incorrectly interpret the controlling statutory provisions. His interpretation was more than a mere "permissible construction," all that is required in order to secure this court's deference. *See Chevron v. Natural Resources Defense Council*; *United States v. Riverside Bayview Homes, Inc.*, —— U.S. ——, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); and *Texas v. United States.* We find the Comptroller's interpretation to be amply supported by the express "language employed by Congress," giving the words it chose their "ordinary meaning." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982).

The district court erred in enjoining the Comptroller and Deposit Guaranty. The injunction imposed is vacated and the judgment is reversed. The Comptroller is entitled to judgment as a matter of law. The matter is returned to the district court for entry of an appropriate judgment.

REVERSED.